88-1740

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ALEXANDER L. STEVAS
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NO.____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SENN TRUCKING COMPANY,

Petitioner,

vs.

ROBERT C. WASSON, CHAIRMAN
CHARLES N. PLOWDEN AND
JOHN H. LAFITTE, JR.,
CONSTITUTIONG THE MEMBERS
OF THE SOUTH CAROLINA TAX
COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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COUNSEL OF RECORD
FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Is the South Carolina use tax imposed as a tax on the enjoyment of the use of the 50 trailers used by Petitioner exclusively for its interstate business an assumption of power by the State which the Commerce Clause was meant to end?

2. If the South Carolina Use Tax Statute does not exempt the gross proceeds of the 50 trailers purchased, then is the use tax imposed repugnant to the Commerce Clause and prohibited under the Constitution or laws of the United States?

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1. Opinion and Order in Prior Court Proceedings

This Petition seeks a review of the Opinion of the South Carolina Supreme Court dated January 19, 1984 affirming the Order dated April 24, 1981 of the South Carolina Common Pleas Court for Richland County.

The effect of this Opinion and Order would deny Petitioner's action for refund of use tax imposed on the gross proceeds of the purchase of 50 trailers. 30 of the trailers were purchased and delivered to Petitioner at Charlotte, North Carolina and 20 of the trailers were purchased and delivered to Petitioner at Augusta, Georgia.

The Opinion of the South Carolina Supreme Court is attached and identified

as Appendix A.

The Order of the South Carolina Common Pleas Court for Richland County is attached and identified as Appendix B.

2. The Grounds on Which the Jurisdiction of this Court is envoked are:

(i) The date of the Opinion sought to be reviewed and the time of its entry is January 19, 1984.

(ii) No Petition for Rehearing filed.

(iii) No cross petition for Writ of Certiorari has been filed by Counsel for Respondents.

(iv) The jurisdiction of this Court is envoked under 28USC1257(3) and a timely Notice of Appeal was filed February 10, 1984.

3. The Constitutional Provisions Which this Case Involves are:

(i) The Commerce Clause, Article I, §8, Cl. 3 provides that:

"The congress shall have power

...

To regulate commerce with foreign nations and among the several states and with the Indian tribes;..."

(ii) The Due Process and Equal Protection Clauses, Amendment XIV, §1:

"...No state shall make or enforce any law which shall abrdige the privileges or immunities of citizens of the United States; nor shall any state deprive any personal of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. A Concise Statement of This Case Containing Facts to The Questions Presented are:

Petitioner is engaged in the business of transporting property by motor vehicle as a common carrier, in interstate or foreign commerce over irregular routes from, to and between points in the United States, except Alaska and Hawaii under Certificates of Public Convenience and Necessity granted it by the Interstate Commerce Commission.

Petitioner purchased 30 trailers from a dealer at Charlotte, North Carolina and accepted delivery of the trailers at Charlotte, North Carolina.

Petitioner purchased 20 trailers from a dealer at Augusta, Georgia and accepted delivery of the trailers at Augusta, Georgia.

The 50 trailers were moved by Petitioner from Charlotte, North Carolina and Augusta, Georgia to its place of business at

Newberry, South Carolina for the principal reason to have certain work performed on them such as decals, unit numbers, ICC certificate numbers and tags as required by the Interstate Commerce Commission and the Department of Transportation. The work on each of the said trailers required one to two days and were then available for use to transport property in interstate commerce.

To conduct its authorized operations, Petitioner maintains 12 stations at points in 12 states excluding South Carolina where trailers are made available to the public.

Petitioner had also purchased 8 trailers and had paid Respondents the use tax therefor because they were used exclusively to transport property

intrastate in South Carolina.

Petitioner received gross revenues of $13,394,048 from the use of its equipment transporting property in interstate commerce for the year 1979.

Petitioner received gross revenues of $84,240 from use of the 8 trailers transporting property in intrastate commerce in South Carolina for the year 1979.

Petitioner paid taxes to the State of South Carolina and certain of its agencies in 1979 of $109,107.45 including real estate, personal property, fuel, income, license tags and public service tags.

The said 50 trailers were put in service at points in South Carolina from which they transported loads to points in interstate commerce to other states.

The evidence submitted by Respondents that the South Carolina Use Tax Statute imposes a use tax on the gross proceeds of the sale of the said 50 trailers; that decals, numbers, signs and license plates were installed and tarpaulins, pads, straps and storage compartments were installed at Newberry, South Carolina.

The invoice of 3 trailers showed that all 3 trailers were invoiced for the same date. The first trailer remained at Newberry, South Carolina 13 days, the second trailer remained at Newberry, South Carolina 14 days and the third trailer remained at Newberry, South Carolina 23 days before they were dispatched to pick up their first load. The 3 trailers are listed on the Newberry County, South Carolina tax records.

The witness for the Respondents admitted that a forklift and Wayne sweeper costing $11,500.00 was purchased by Petitioner at Charlotte, North Carolina and moved to Newberry, South Carolina where they were used. These items were deleted by Respondents from any tax liability.

5. <u>The Jurisdiction Questions Sought to be Reviewed Were Properly and Timely Raised As Follows:</u>

(i) In the Court of the first instance by the Allegations of ¶IX of the Complaint raised the issues that the 50 trailers were purchased and delivered to Petitioner in States other than South Carolina, were brought into South Carolina for the purpose of inspecting and equipping trailers to be used in interstate commerce and then dispatched to pick up a load

in South Carolina to be delivered to a point outside the State of South Carolina.

(ii) The issues were raised by the Petitioner in its Exceptions 1 through 19 inclusive, to the Order in the Court of the first instance (Appendix B) and are shown in the "Agreed Case and Exceptions" of the appeal to the South Carolina Supreme Court.

6. Concise Argument Amplifying Reasons for Allowing a Writ

In passing on the first issue, the Court applied the applicable sections of the South Carolina Code imposing the use tax. The Sections define "use" "storage" or other consumption in South Carolina. The Court finds that there was a use and storage of the 50 trailers in South Carolina even though it was

temporary for a short period of time to inspect and equip the 50 trailers to be used to transport property in interstate commerce and concludes that there was a use and storage in South Carolina sufficient to impose the use tax.

In passing on the second issue, the Court finds that the interruption in the journey of the trailers in interstate commerce from Charlotte, North Carolina and Augusta, Georgia to South Carolina to inspect and equip them for use in interstate commerce was sufficient to create a taxable moment whereby South Carolina could impose the use tax and that the Due Process Clause of the XIV Amendment to the United States Constitution did not invalidate the use tax even though the use tax exemption

applied to the provisions of rail cars, locomotives and the parts thereof which were specifically specified under the provisions of the exemption in §12-35-550(20), 1976 SC Code of Laws, and as amended.

The Petitioner and the railroads were granted authority to transport property by the Interstate Commerce Commission. Both operate under the regulations of said Commission.

The South Carolina Supreme Court, by its Opinion (Appendix A) adopted, with minor modifications, the Order of the Court of the first instance. Neither the Order of the Court of the first instance nor the Opinion of the South Carolina Supreme Court discuss or apply the four criteria for determining the validity of a state use tax affecting

interstate commerce under the Commerce Clause.

Under the criteria announced in Complete Auto Transit, Inc. v. Brady, 430 US 274 (1977) which criteria was cited, applied and approved in Maryland v. Louisiana, 451 US 275 (1981). The four criteria are as follows:

(i) The tax must be applied to an activity that has a substantial nexus with the State.

(ii) The tax must be fairly apportioned to activities carried on by the taxpayer in the State.

(iii) The tax must not discriminate against interstate commerce.

(iv) The tax must be fairly related to service provided by the State.

The South Carolina Use Tax does not provide for any apportionment of the

use tax on any basis among the States in which the 50 trailers are used in interstate commerce. Respondents imposed the full use tax rate on the gross proceeds of the sale of the 50 trailers.

In Union Tank Lines v. Wright, 249 US 275 (1919) the ourt was required to consider the powers of a State to levy and collect taxes upon the instrumentalities of interstate commerce which were both within and without the states jurisdiction. The levy of the full amount of the use tax without any apportionment of the use tax due by Petitioner operating in many states is arbitrary. Petitioner is subject to the levy of the use tax in the other states in which it operates in interstate commerce which is multiple taxation.

The levy of the use tax by each state in which said trailers will be operated produce results wholly unreasonable and deprives Petitioner of its property without due process of law and also an undue burden on interstate commerce.

The Due Process Clause, Article XIV, §1 Amendment to the United States Constitution requires the measure of the tax to farily reflect the activities in the state of the use of said 50 trailers.

The South Carolina Supreme Court and the Court of the first instance failed to consider and apply §12-35-180 of Article 1 which is as follows:

> "The provisions of this Article shall not affect the exemptions specifically provided for in Articles 5 and 7 of this Chapter."

Sections 12-35-160, 12-35-130, 12-35-110 and 12-35-170 defining use, storage, purchase at retail and explaining wholesale sales are found in Article 1 of the chapter on sales and use tax and were given affect by the South Carolina Supreme Court and the Court of the first instance.

Section 12-35-550 providing for the applicable exemption is found in Article 5 of said chapter.

7. Review of the Judgment of a Federal Court

This Petition does not involve the review of the Judgment of a federal court.

8. Appendicies

The Appendicies contain the following:

(i) Copy of the Opinion of the South Carolina Supreme Court identified

as Appendix A.

(ii) Copy of the Order of the Court of the first instance identified as Appendix B.

All of which is respectfully submitted.

s/

Frank A. Graham, Jr.
P O Box 11864
Columbia SC 29211

Dated: April 24, 1984

APPENDIX A

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Senn Trucking Company.....Appellant

v.

Robert C. Wasson, Chairman and Charles N. Plowden and John H. LaFitte, Jr., Constituting the Members of the South Carolina Tax Commission.....Respondents.

Appeal from Richland County
Joseph R. Moss, Special Circuit Judge

Opinion No. 22032
Heard December 8, 1983 Filed January 19, 1984

AFFIRMED

Frank A. Graham, Jr. of Columbia for Appellant.

Attorney General T. Travis Medlock, Retired Attorney General Daniel R. McLeod, Deputy Attorney General Joe L. Allen,Jr., and Staff Attorney Ray N. Stevens, all of Columbia, for Respondents.

PER CURIAM: The order of the Honorable Joseph R. Moss, Presiding Judge, properly sets forth and disposes of all issues raised on this appeal. That order with minor modifications is printed as the directive of this Court:

ORDER

This action was commenced by the plaintiff, Senn Trucking Company (Senn) on December 16, 1980, against the defendant, South Carolina Tax Commission (Commission) under the provisions of §12-35-1440, Code of Laws of South Carolina (1976), seeking a recovery of use taxes paid under protest on November 21, 1980, pursuant to §12-35-1430 in the amount of $25,726.12. Prior to the trial, the parties entered

into a Stipulation of Facts which, along with testimony at trial, form the factual basis for the decision in this case.

Senn is engaged in the business of transporting property by motor vehicle in interstate commerce as a common carrier operating under Certificates of Public Convenience and Necessity granted by the Interstate Commerce Commission. In addition, Senn moves freight in intrastate commerce but such intrastate commerce is much smaller than its interstate business. For example, the evidence shows that gross revenues for 1979 were $13,394,048.39 from interstate commerce, whereas gross revenues from intrastate commerce were $84,240.00.

The taxes sought to be recovered were paid by Senn on fifty trailers it purchased out of state. In each instance, the trailers were transported by Senn to its terminal in Newberry County, S.C. and underwent modifications there. These modification consisted of adding decals, numbers, signs and license plates, tarpaulins, padding, straps and storage compartments.

The testimony presented at trial shows that based on sales invoices, work orders and drivers' trip tickets, the trailers remained in Newberry County approximately two to three weeks before they were dispatched to pick up their first load of freight. In each instance the trailers picked up their first load in South Carolina and then left the state. The trailers periodically

returned to South Carolina to pick up and deliver freight. Finally, the evidence showed that the trailers were registered in Newberry County for property tax purposes.[1]

Against this factual background, I must decide two issues:

(1) Is Senn subject to a use tax on the fifty trailers?

(2) If Senn is subject to a use tax, is there an exemption applicable to the transactions in this case which removes them from the liability for a use tax?

Section 12-35-810 is the applicable

[1]At oral argument, counsel for Senn admitted that sales or use tax had not been paid in any other state. It appears to be admitted that property taxes were paid on three units in Newberry County; counsel stated that he did not know whether property tax had been paid on the other forty-seven units in any other state.

section of the South Carolina Code which imposes a use tax. The pertinent part of such section is as follows:

> An excise tax is imposed on the storage, use or other consumption in this State of tangible personal property purchased at retail for storage, use or other consumption in this State, at the rate of four percent of the sales price of such property, regardless of whether the retailer is or is not engaged in business in this State.

To establish a use tax there must be (1) a showing of either a storage, use or other consumption of tangible personal property in South Carolina and (2) such tangible personal property must have been purchased at retail. Each of these elements are satisfied in the case of Senn Trucking Company.

The criteria for a "use" in South Carolina is set forth in §12-35-160 as follows:

> The term "use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction in which possession is given, except that it shall not include the sale of that property in the regular course of business.

The evidence before me demonstrates that Senn exercised its "right or power over tangible personal property incident to ownership of that property". Senn exercised its rights incident to ownership by transporting the trailers to Silverstreet in Newberry County. While at Silverstreet, Senn made alterations and changes to the trailers which further show an exercise of ownership rights. The trailers were subject to Senn's control since Senn put them into service in South Carolina in that they picked up their first load of freight in this State. Finally,

Senn exercised its power over the trailers by having them registered in Newberry County for property tax purposes.[2]

Although it is sufficient for a use tax liability that only a use in South Carolina be shown, the evidence shows that not only was there a use, but also there was a storage of the trailers in South Carolina sufficient to make Senn liable for the use tax. The statute defines storage at §12-35-130 as follows:

> The term "storage" includes any keeping or retention in this State, for any purpose except sale in the regular course of business or subsequent use solely outside this State, of tangible personal property purchased at retail.

Under this definition, the trailers were in storage until they were

[2] See, footnote 1, supra.

dispatched to pick up a load of freight in South Carolina. The length of this storage, based on the evidence before me, was approximately two to three weeks before the trailers were dispatched to pick up their first load of freight.

Having established that there was a use and a storage of the trailers in South Carolina, the use tax statute requires that the purchase of tangible personal property be at retail. Section 12-35-110 explains that a retail sale means all sales except those defined as wholesale sales. Section 12-35-170 explains that a wholesale sale does not include a sale to users or consumers. Since Senn is the ultimate user or consumer of the trailers, the sales to Senn are not at wholesale and, therefore, are sales at retail.

Thus, I conclude that the purchase of the fifty trailers and subsequent use and storage in South Carolina make Senn subject to the use tax imposed by §12-35-810. Having so concluded, the second issue of whether an exemption applies to this transaction must be addressed.

Section 12-35-820(2) provides an exemption from use tax for all tangible personal property specifically exempted from the tax imposed by the provisions of Article 5 of Chapter 35, which covers sales tax. Section 12-35-550(1) of the sales tax provisions grants an exemption for sales of tangible personal property which South Carolina is prohibited from taxing under the Constitution or laws of the United States. Senn argues that Article 1, Section 8 of

the United States Constitution, commonly referred to as the Commerce Clause, prohibits South Carolina from taxing the use of the fifty trailers since such trailers are vehicles used in interstate commerce. The position of the Tax Commission is that the activities giving rise to the tax are all intrastate and that there existed a taxable moment in South Carolina when the trailers came to rest in this state. Thus, the question is whether the use of the trailers is interstate in nature and thus exempt or taxable as an intrastate event.

In United States Supreme Court in Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389 (1939), dealt with a California use tax on property bought outside California

and then brought into that state where it was attached to railroad equipment which moved in interstate commerce. The court's analysis is applicable to the instant case and such analysis is quoted below:

> The principle illustrated by the Helson Case [279 U.S. 245, 49 S.Ct. 279] forbids a tax upon commerce or consumption in commerce. The Wallace Case [288 U.S. 249, 53 S.Ct. 345] and precedents analogous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon "use" or "storage", no further inquiry is necessary as to the rest of the articles which are subjected

to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use--retention and exercise of a right of ownership, respectively--was effective. The interstate movement was complete. The interstate consumption had not begun. ..."Practical continuity" does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter

> distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress.

[Here the trial judge quotes at length Henneford v. Silas Mason Co., 300 U.S.577, 57 S.Ct. 524 (1937), to the same effect. The quotation is omitted for the sake of brevity.]

With these cases as the legal background, the facts show that the tax in the instant case is a tax on the use and storage in South Carolina and is not a tax on interstate commerce. The "use" which is defined as the

exercising of any right or power over the ownership of the trailers occurred within South Carolina since the trailers were transported by Senn to Newberry County, alterations and modifications were made in Newberry, the trailers were registered for property tax purposes in Newberry County, and Senn directed that the trailers pick up freight within South Carolina. Each of these activities shows the exercising of a power over the ownership of the trailers and such activities all occurred within the borders of South Carolina. These activities are all intrastate and do not cause a tax to be laid on interstate commerce.

Further support for the conclusion that the tax is on only an intrastate event is found from the fact that storage

of the trailers occurred in South Carolina. Evidence shows that storage was made in this State for two to three weeks. Based on the holdings of Southern Pacific, supra, and Henneford, supra, the events leading up to the use and storage within a state and the events after the use and storage within a state are not controlling factors. The tax is levied when the trailers ceased to be in transit and, in the instant case, cessation occurred in South Carolina. As the Supreme Court said in International Harvester Co. v. Department of Treasury, 322 U. S. 340, 64 S.Ct. 1019 (1944):

> But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation of intercourse which is interstate commerce.

In summary, the general rule of

of property coming to rest within a state as making the property subject to a use tax has been stated in 68 Am. Jur. 2d. Sales and Use Taxes, Section 190:

> ...the decisions relating to use tax statutes have for the most part been consistent in holding that, in their application to tangible personal property carried into the state and there brought to rest permanently or merely halted for a moment before resuming its interstate course or character taxes upon the privilege of use, storage or consumption within the state do not impose an unconstitutional burden on interstate operations or instrumentalities...

Since the exercising of powers of ownership over the trailers and storage occurred in South Carolina before the trailers began any movement in interstate commerce, the use tax is not in violation of the Commerce Clause

and thus no exemption is afforded Senn Trucking Company.

One final argument raised by Senn is that its rights to the equal protection of the laws have been violated. Senn argues that its rights to the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution have been violated since §12-35-550(20) grants an exemption to railroad equipment whereas no such exemption is given to trucking equipment. In short, Senn argues that it is the subject of discrimination. The position of the Tax Commission is that there is no discrimination and that the classification including railroads within an exempt class is within the power of

the General Assembly to make.

Our Supreme Court in State v. Byrnes, 219 S.C. 485, 66 S.E.2d (1951), explained the role of equal protection in evaluating the sales tax exemptions.

> To invalidate a tax statute for discrimination, in the absence of specific constitutional inhibition, exemption from its terms must be purely arbitrary, which cannot be fairly said of the exemptions in the Act before us. It was said in Marshall v. Tax Com., supra, (178 S.C. at page 62, 182 S.E. at page 98) upon the authority of numerous cited decisions of the U. S. Supreme Court: "The plaintiff must be able to satisfy the court that the classification (of income for State taxation) has its origin in nothing better than whim and fantasy and tyrannical exercise of arbitrary power, before the tax in question will be stricken down."

In the instant case there is no evidence which shows that the classification is based on nothing but "fantasy

and tyrannical exercise of arbitrary power". The General Assembly is free to make classifications which it finds to be reasonable and such classifications can be overturned only by the plaintiff's carrying the burden of proof that the classification is arbitrary. Gregg Dyeing Co. v. Query, 166 S.C. 177, 164 S.E. 588 (1931), affirmed 286 U.S. 472, 52 S.Ct. 631. There are inherent differences in railroads and trucks such as a railroad's mobility being limited by tracks whereas trucks are allowed free access on highways. The General Assembly's decision to exempt railroads and not to exempt trucks and trailers is not an arbitrary classification and thus no violation of Senn's equal protection rights has been shown.

Since Senn has been found to be subject to a use tax on the fifty trailers in question and since no exemption is available and no violation of equal protection has been found, I conclude that the use tax at issue in this case is proper.

AFFIRMED.

/s/ J. Woodrow Lewis C.J.

/s/ Bruce Littlejohn A.J.

/s/ J. B. Ness A.J.

/s/ G.T. Gregory, Jr. A.J.

/s D.W. Harwell A.J.

Appendix B

STATE OF SOUTH CAROLINA)	IN THE COURT
COUNTY OF RICHLAND)	OF COMMON PLEAS
	80-CP-40-4849
Senn Trucking Company,)	
Plaintiff,)	
vs.)	
Robert C. Wasson, Chairman and Charles N. Plowden and John H.) LaFitte, Jr., Constituting the Members of) the South Carolina Tax Commission,)	ORDER
Defendants.)	

This action was commenced by the plaintiff, Senn Trucking Company (hereinafter referred to as "Senn") on December 16, 1980, against the defendants, Robert C. Wasson, Charles N. Plowden and John H. LaFitte, Jr., as the members of the South Carolina Tax Commission (hereinafter referred as the "Commission") under the provisions of §12-35-1440,

Code of Laws of South Carolina (1976), seeking a recovery of use taxes paid under protest on November 21,1980, pursuant to §12-35-1430 in the amount of $25,726.12. This matter was heard by me on February 10, 1981, without a jury. Prior to trial, the parties entered into a Stipulation of Facts which, along with testimony at trial, form the factual basis for the decision in this case.

Senn is engaged in the business of transporting property by motor vehicle in interstate commerce as a common carrier operating under Certificates of Public Convenience and Necessity granted by the Interstate Commerce Commission. In addition, Senn moves freight in intrastate commerce but such intrastate commerce is much smaller

than its interstate business. For example, the evidence shows that gross revenues for 1979 were $13,394,048.39 from interstate commerce, whereas gross revenues from intrastate commerce were $84,240.00.

The transactions which gave rise to the imposition of the use taxes in this controversy involved the purchase by Senn of fifty trailers from out-of-state sellers. Twenty trailers were purchased and delivered at Augusta, Georgia and the remaining thirty trailers were purchased and delivered at Charlotte, North Carolina. In each instance, the trailers were transported by Senn to its terminal in Newberry County and underwent modifications there. These modifications consisted of adding

decals, numbers, signs and license plates, tarpaulins, padding, straps and storage compartments. After the modifications were made, the trailers were ready to be dispatched to pick up their first load of freight.

The testimony presented at trial shows that based on sales invoices, work orders and drivers' trip tickets, the trailers remained at Silverstreet near Newberry County approximately two to three weeks before they were dispatched to pick up their first load of freight. In each instance the trailers picked up their first load in South Carolina and then left the state. The trailers periodically returned to South Carolina to pick up and deliver freight. Finally, the evidence showed that the trailers were registered in Newberry

County for property tax purposes.

Against this factual background, I must decide two issues:

(1) Is Senn subject to a use tax on the fifty trailers?

(2) If Senn is subject to a use tax, is there an exemption applicable to the transactions in this case which removes them from the liability for a use tax?

Section 12-35-810 is the applicable section of the South Carolina Code which imposes a use tax. The pertinent part of such section is as follows:

> "An excise tax is imposed on the storage, use or other consumption in this State of tangible personal property purchased at retail for storage, use or consumption in this State, at the rate of four percent of the sales price of such property, regardless of whether the retailer is or is not engaged in business in this State."

To establish a use tax there must be (1) a showing of either a storage, use or other consumption of tangible personal property in South Carolina and (2) such tangible personal property must have been purchased at retail. Each of these elements are satisfied in the case of Senn Trucking Company.

The criteria for a "use" in South Carolina is set forth in §12-35-160 as follows:

> "The term 'use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction in which possession is given, except that it shall not include the sale of that property in the regular course of business."

The evidence before me demonstrates that Senn exercised its "right or power over tangible personal property incident to ownership of that property". Senn

exercised its rights incident to ownership by transporting the trailers to Silverstreet in Newberry County. While at Silverstreet, Senn made alterations and changes to the trailers which further show an exercise of ownership rights. The trailers were subject to Senn's control since Senn put them into service in South Carolina in that they picked up their first load of freight in this State. Finally, Senn exercised the power over the trailers by having them registered in Newberry County for property tax purposes.

Although it is sufficient for a use tax liability that only a use in South Carolina be shown, the evidence shows that not only was there a use, but also there was a storage of the trailers in South Carolina sufficient

to make Senn liable for the use tax. The statute defines storage at §12-35-130 as follows:

> "The term 'storage' includes any keeping or retention in this State, for any purpose except sale in the regular course of business or subsequent use solely outside this State, of tangible personal property purchased at retail."

Under this definition, the trailers were in storage until they were dispatched to pick up a load of freight in South Carolina. The length of this storage, based on the evidence before me, was approximately two to three weeks before the trailers were dispatched to pick up their first load of freight.

Having established that there was a use and a storage of the trailers in South Carolina, the use tax statute

requires that the purchase of tangible personal property be at retail. Section 12-35-110 explains that a retail sale means all sales except those defined as wholesale sales. Section 12-35-170 explains that a wholesale sale does not include a sale to users or consumers. Since Senn is the ultimate user and consumer of the trailers, the sales to Senn are not at wholesale and, therefore, are sales at retail.

Thus, I conclude that the purchase of the fifty trailers and subsequent use and storage in South Carolina make Senn subject to the use tax imposed by §12-35-810. Having so concluded, the second issue of whether an exemption applies to this transaction must be addressed.

Section 12-35-820(2) provides an

exemption from use tax for all tangible personal property specifically exempted from the tax imposed by the provisions of Article 5 of Chapter 35 which covers sales tax. Section 12-35-550(1) of the sales tax provisions grants an exemption for sales of tangible personal property which South Carolina is prohibited from taxing under the Constitution or laws of the United States. Senn argues that Article 1, Section 8 of the United States Constitution, commonly referred as the Commerce Clause, prohibits South Carolina from taxing the use of the fifty trailers since such trailers are vehicles used in interstate commerce. The position of the Tax Commission is that the activites giving rise to the tax are all intrastate and that there existed a taxable moment in South

Carolina when the trailers came to rest in this State. Thus, the question is whether the use of the trailers is interstate in nature and thus exempt or taxable as an intrastate event.

The United States Supreme Court in Southern Pacific Co. v. Gallagher, 306 U.S.167, 59 S.Ct. 389 (1939), dealt with a California use tax on property bought outside California and then brought into that state where it was attached to railroad equipment which moved in interstate commerce. The court's analysis is applicable to the instant case and such analysis is quoted below.

> "The principle illustrated by the Helson Case [279 U.S. 245, 49 S.Ct. 279] forbids a tax upon commerce or consumption in commerce. The Wallace Case [288 U.S. 249, 53 S.Ct. 345] and precedents analogous to it, permit state

taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage', no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use--retention and exercise of a right of ownership, respectively--was effective. The interstate movement was complete. The interstate consumption had not begun.***. 'Practical continuity' does

not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state inference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate

and foreign commerce to the Congress."

Earlier in 1937 the Supreme Court in Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, found that a use tax which is on the privilege of use in a state is a taxable event when the property used or stored has ceased to be in transit.

> "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. Nashville, C. & St. L. Ry. Co. v. Wallace, supra; Bromley v. McCaughn, 280 U.S. 124, 136-138, 50 S.Ct. 46,48, 74 L.Ed. 226; Burnet v. Wells, 289 U.S. 670,678, 53 S.Ct. 761,764,77L.Ed. 1439. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. Id. Calling the tax an excise when it is laid solely upon the use (Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 P. (2d) 14) does not make the power to impose it less, for anything

> the commerce clause has to say of its validity, then calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales***has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the state may be subjected.' Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U.S. 147, 153, 52 S.Ct. 340, 341, 76 L.Ed. 673. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate.***."

With these cases as the legal background, the facts show that the tax in the instant case is a tax on the use and storage in South Carolina and not a tax on interstate commerce.

The "use" which is defined as the exercising of any right or power over the ownership of the trailers occurred within South Carolina since the trailers were transported by Senn to Newberry County, alterations and modifications were made in Newberry, the trailers were registered for property tax purposes in Newberry County, and Senn directed that all the trailers pick up freight within South Carolina. Each of these activities shows the exercising of a power over the ownership of the trailers and such activities all occurred within the borders of South Carolina. These activities are all intrastate and do not cause a tax to be laid on interstate commerce.

Further support for the concludsion that the tax is on only an intrastate

event is found from the fact that storage of the trailers occurred in South Carolina. Evidence shows that storage was made in this State for two to three weeks. Based on the holdings of Southern Pacific, supra and Henneford, supra, the events leading up to the use and storage within a state and the events after the use and storage within a state are not controlling factors. The tax is levied when the trailers ceased to be in transit and, in the instant case, cessation occurred in South Carolina. As the Supreme Court said in International Harvester Co. v. Department of Treasury, 322 U.S. 340, 64 S.Ct. 1019 (1944):

> "But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate

commerce."

In summary, the general rule of property coming to rest within a state as making the property subject to a use tax has been stated in 68 Am. Jur. 2d, Sales and Use Taxes Section 190:

> "***the decisions relating to use tax statutes have for the most part been consistent in holding that, in their application to tangible personal property carried into the state and there brought to rest permanently, or merely halted for a moment before resuming its interstate course or character, taxes upon the privilege of use, storage, or consumption within the state do not impose an unconstitutional burden on interstate operations or instrumentalities.***."

Since the exercising of powers of ownership over the trailers and storage occurred in South Carolina before the

trailers began any movement in interstate commerce, the use tax is not in violation of the Commerce Clause and thus no exemption is afforded Senn Trucking Company.

One final argument raised by Senn is that its rights to the equal protection of the laws have been violated. Senn argues that its rights to the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution have been violated under §12-35-550(20) grants an exemption to railroad equipment whereas no such exemption is given to trucking equipment. In short, Senn argues that it is the subject of discrimination. The position of the Tax Commission is that there

is no discrimination and that the classification including railroads within an exempt class is within the power of the General Assembly to make.

Our Supreme Court in State v. Byrnes, 219 S.C. 485, 66 S.E.2d 33, explained the role of equal protection in evaluating the sales tax exemptions.

> "To invalidate a tax statute for discrimination, in the absence of specific constitutional inhibition, exemption from its terms must be purely arbitrary, which cannot be fairly said of the exemptions contained in the Act before us. It was said in Marshall v. Tax Comm., supra, (178 S.C. at page 62, 182 S.E. at page 98) upon the authority of numerous cited decisions of the U. S. Supreme Court: 'The plaintiff must be able to satisfy the court that the classification (of income for State taxation) has its origin in nothing better than whim and fantasy and tyrannical exercise of arbitrary power, before the tax in question will be stricken down.'"

In the instant case there is no evidence which shows that the classification is based on nothing but "fantasy and tyrannical exercise of arbitrary power". The General Assembly is free to make classifications which it finds to be reasonable and such classifications can be overturned only by the plaintiff's carrying his burden of proof that the classification is arbitrary. Gregg Dyeing Co. v. Query, 166 S.C. 177, 164 S.E. 588, affirmed 286 U.S. 472, 52 S.Ct. 631. There are inherent differences in railroads and trucks such as a railroad's mobility being limited by tracks whereas trucks are allowed free access on highways. The General Assembly's decision to exempt railroads and not to exempt trucks and trailers is not an arbitrary

classification and thus no violation of Senn's equal protection rights has been shown.

Since Senn has been found to be subject to a use tax on the fifty trailers in question and since no exemption is available and no violation of equal protection has been found, I conclude that the use tax at issue in this case is proper.

AND IT IS SO ORDERED.

/s/ Joseph R. Moss
Presiding Judge

April 24, 1981

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 1984, three copies of the Petition for Writ of Certiorari were mailed, by depositing same in the United States Post Office at Columbia, South Carolina, by certified mail, with postage prepaid, on Ray N. Stevens, Counsel of Record for Respondents, Attorney General's Office, Calhoun State Building, Columbia, South Carolina.

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FILED
MAY 24 1984
ALEXANDER L. STEVAS
CLERK

NO. 83-1740

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

SENN TRUCKING COMPANY,

Petitioner,

vs.

ROBERT C. WASSON, CHAIRMAN
CHARLES N. PLOWDEN AND
JOHN H. LAFITTE, JR.,
CONSTITUTING THE MEMBERS
OF THE SOUTH CAROLINA TAX
COMMISSION,

Respondents.

BRIEF IN OPPOSION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the imposition by South Carolina of a use tax resulting from the purchase of trailers violate Article 1, Section 8 of the United States Constitution (Commerce Clause) where such trailers were transported empty to South Carolina, were subjected to numerous modifications and repairs in South Carolina, and were held in storage in South Carolina for two to three weeks before picking up their first load of freight within the State?

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OPINION AND ORDER IN PRIOR PROCEEDINGS

The opinion and order in prior court proceedings have been adequately set forth in the Petition for Writ of Certiorari and nothing further is added here.

JURISDICTION

This Honorable Court is being asked to accept jurisdiction of this matter under 28 U.S.C. 1257(3). Although this matter may be technically within 28 U.S.C. 1257(3), the granting of a review on Writ of Certiorari is a matter of judicial discretion and should be granted only where there are special and important reasons. There are not such reasons in the instant case since the applicability of a use tax to equipment stored or used in a state prior to such equipment's entering interstate commerce has been confirmed by this Court in prior opinions.

Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1939) and Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1936). Thus the South Carolina Supreme Court has decided the issue in compliance with the United States Supreme Court's decisions and jurisdiction should be denied.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Constitutional Provision

The Commerce Clause, Article 1, Section 8, Clause 3:

> "The congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes; * * *."

State Statutes

1. Section 12-35-810 provides:

> "An excise tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use or other consumption in this State, at the rate of four percent of the sales price of such

property, regardless of whether the retailer is or is not engaged in business in this State."

2. Section 12-35-160 provides:

"The term 'use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction in which possession is given, except that it shall not include the sale of that property in the regular course of business."

3. Section 12-35-130 provides:

"The term 'storage' includes any keeping or retention of this State, for any purpose except sale in the regular course of business or subsequent use solely outside this State, of tangible personal property purchased at retail."

4. Section 12-35-820(2) provides:

"The storage, use or other consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this article:

* * *

(2) All tangible personal property specifically exempted from the tax imposed by the provisions of Article 5 of this Chapter."

5. Section 12-35-550(1) provides:

> "There are exempted from the provisions of this article, and from the computation of the amount of the tax levied, assessed or payable under this article, the following:
>
> (1) The gross proceeds of the sale of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

STATEMENT OF THE CASE

The Statement of the Case presented in the Petition for Writ of Certiorari does not completely reflect all of the facts pertinent to this matter. After the purchase of the twenty trailers in Augusta, Georgia and the thirty trailers in Charlotte, North Carolina, the petitioner transported the trailers to its primary terminal at Newberry, South Carolina. The trailers arrived in Newberry empty.

Upon arrival in Newberry, the trailers were modified by the addition of decals,

numbers, signs and license plates, tarpaulins, padding, straps and storage compartments. (See Appendix A-4 of Petition for Writ of Certiorari.) After the modifications were completed, the trailers were available for transporting goods. However, before the trailers actually picked up their first load, a period of two to three weeks elapsed during which time the trailers were stored in South Carolina. (See Appendix A-4 of Petition for Writ of Certiorari.) The trailers were registered in Newberry County for property tax purposes and each trailer picked up its first load of freight in South Carolina. (See Appendix A-4 of Petition for Writ of Certiorari.)

ARGUMENT SUMMARY

The law is well settled that a use tax does not violate the Commerce Clause where the facts demonstrate the purchased property was carried into the taxing state and there

brought permanently to rest or merely halted temporarily before resuming its interstate course or usage. Southern Pacific Co., supra. Further, the decision of the South Carolina Supreme Court is in conformity with the decisions of the highest courts of other states which have addressed similar questions. Thus, review by this Court is unwarranted since such would involve only applying established evidence to familiar legal principles. Here, there is ample evidence demonstrating a storage of two to three weeks in South Carolina and the exercising of ownership over the trailers within South Carolina.

Further, there is no conflict between the decision of the South Carolina Supreme Court in this matter and the decision of this court in Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Complete Auto's test is not applicable since the use tax in question is upon

the privilege of use after commerce is at an end and such tax is not a tax which substantially affects interstate commerce. Beatrice Foods Co., Inc. v. Lindley, 434 N.E.2d 727 (Ohio 1982). Even assuming the four tests of Complete Auto, supra, do apply, all are satisfied since the activities of the petitioner in South Carolina are substantial, the tax is fairly apportioned since South Carolina's tax is a first use tax with the first use capable of only occurring in one state, the tax is nondiscriminatory and the tax is fairly related to the services provided by South Carolina.

Based upon the foregoing, the Petition for Writ of Certiorari should be denied.

ARGUMENT

The issue raised in this matter is the alleged violation of the Commerce Clause of the United States Constitution at Article 1,

Section 8 by the imposition of a use tax resulting from the purchase of trailers. The trailers were stored in South Carolina for two to three weeks and were first placed in service in South Carolina after being subjected to numerous modifications.

This Court should not grant the Petition sought since this matter has been resolved by this Court in prior opinions and by other State Courts on prior occasions. Further, the result in the South Carolina Supreme Court is a correct result and does not conflict with the four criteria of Complete Auto Transit, Inc. v. Brady, supra.

The imposition of a use tax has been upheld as not in violation of the Commerce Clause by this Court on numerous occasions where the facts show property was carried into the taxing state and there brought permanently to rest or merely halted temporarily before resuming its interstate course or

usage. Scripto v. Carson, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960); General Trading Co. v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944); Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888 (1941); McGoldrick v. Berwind-White Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488(1939); Pacific Telephone & Telegraph Co. v. Gallagher, 306 U.S. 182, 59 S.Ct. 396, 83 L.Ed. 595 (1939); Southern Pacific Co. v. Gallagher, supra, and Henneford v. Silas Mason Co., supra. The same result has been reached on many varied fact situations in state courts of last resort and the result reached by the South Carolina Supreme Court is consistent with such decisions. Hunnewell Trucking, Inc. v. Johnson, 172 A.2d 732 (N.C. 1961); Great Lakes Dredge & Dock

Company v. Norberg, 369 A.2d 1101 (R.I. 1977); Tri-City Broadcasting Co. v. Bowers, 158 N.E.2d 203 (Ohio 1959); Management Services, Inc. v. Spradling, 547 S.W.2d 466 (Mo. 1977); Skelton v. Pederal Express Corp., 531 S.W.2d 941 (Ark. 1976); Mavar Shrimp & Oyster Co. v. Stone, 73 So.2d 109 (Miss. 1954); Powell v. Maxwell, 186 S.E. 326 (N.C. 1936); Colonial Pipeline Company v. Clayton, 166 S.E.2d 671 (N.C. 1969); Serodino, Inc. v. Woods, 568 S.W.2d 610 (Tenn. 1978).

It is undisputed that the trailers at issue were stored for two to three weeks and underwent repairs and modifications in South Carolina prior to picking up their first load of freight. During such storage period and because of such repairs and modifications, the trailers acquired a "taxable moment" when such trailers were not in interstate commerce. Southern Pacific v. Gallagher,

supra. Thus, a review by this Court is unwarranted since such would involve only applying established evidence to familiar legal principles where the factual findings are supported by substantial evidence.

There is no conflict between this Court's decision in Complete Auto Transit, Inc., supra, and the decision reached by the South Carolina Supreme Court in the instant case. Complete Auto Transit requires that before a tax which substantially affects interstate commerce may be imposed, such tax must be related to local activities, fairly apportioned, nondiscriminatory and fairly related to the services provided by the state.

First, this is not a tax which substantially affects interstate commerce as was the case in Complete Auto Transit, supra. In that case, a five percent tax was levied upon gross income with the gross income

being derived from both interstate and intrastate activities. However, in the instant case, a use tax is imposed with such tax being not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end. Beatrice Foods Co., Inc. v. Lindley, supra, at 731. The use or exercising of ownership and storage occurred within South Carolina prior to the trailers ever entering interstate commerce.

Even assuming the tests of Complete Auto Transit, supra, do apply, all four prongs are satisfied. First, the petitioner has substantial activity connected with South Carolina to support a nexus to this State since it operates many terminals in the State, has its primary terminal in Newberry, South Carolina, and is incorporated under South Carolina law.

Second, the use tax is fairly apportioned. The fair apportionment is aimed at eliminating the risk of multiple taxation. The

record shows that the use tax here imposed was the only tax imposed on the purchase of the fifty trailers in that no other state imposed a sales or use tax. Further, no other state could impose a use tax like South Carolina's on the purchase of the trailers since the South Carolina use tax operates as a compensatory tax complementing the sales tax. South Carolina's use tax is a first use tax and the first use can only occur in one place. Thus, no apportionment is required where the first use as here occurred in South Carolina.

Third, there is no discrimination against interstate commerce since all buyers in South Carolina will pay either a four percent sales tax charged and collected by their seller if a purchase is made in the State, or a four percent use tax if the purchase is made outside the State but used, stored, or consumed in South Carolina.

Thus, buyers whether within or without the State are treated equally and no discrimination against interstate commerce results.

Fourth, the tax is in fair relation to services provided by South Carolina since the measure of the tax, the sales price, is reasonably related to the extent of the petitioner's contact within South Carolina. Commonwealth Edison v. State of Montana, 453 U.S. 609 (1981).

Since there is no conflict with Complete Auto Transit and since the decision of the South Carolina Supreme Court is in keeping with the numerous decisions of both this Court and other State Courts, there is no basis for granting the Petition for Writ of Certiorari.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 23, 1984

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 1984, three copies of a Brief In Opposition To Petition For Writ of Certiorari were mailed by depositing same in the United States Post Office at Columbia, South Carolina, with first class postage prepaid, addressed to Frank A. Graham, Jr., as Counsel of Record for the Petitioner, at Post Office Box 11864, Columbia, South Carolina 29211.

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